Supreme Court, U.S.
FILED
AUG 18 1994
OFFICE OF THE CLERK

No. 93-1784

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHN PATTERSON, *et al.*,

Petitioners,

v.

NEWSPAPER AND MAIL DELIVERERS UNION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

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Petitioners wish to reply to the briefs in opposition to the petition for a writ of certiorari filed by respondent New York Times and by the Equal Employment Opportunity Commission.

I.

INTRODUCTION

The New York Times takes issue with a number of assertions made by petitioners in their Statement of the Case. Its objections are not well-founded.

1. The Times states that the Petitioners are wrong in stating that Judge Pierce relied in part on the continued existence of claims of discrimination in denying a 1979 application to modify the Consent Decree by eliminating the

role of the Administrator. Times Brief in Opposition, p. 4. The Times' characterization of Judge Pierce's decision is incorrect. He did not merely refer to a number of pending claims, but also held:

> In this regard, the proposed replacement of the Administrator with the EEOC and the Adjustment Board is not an acceptable alternative to maintaining the position of the Administrator. Under the proposed plan the central function of resolving claims of racial employment discrimination is to be referred to the Adjustment Board which consists of persons representing the very defendants who have been charged in these actions with having engaged in practices which resulted in the exclusion of minority employees in this industry. Indeed, some of the claims of employment discrimination which, under this proposal the Adjustment Board would be called upon to resolve, might well involve defendants who have representatives on the Board.

App. 60a.

2. The Times now attempts to argue that there is a dispute over whether the relevant workforce has grown to more than 50% minority. Times Brief in Opposition, p. 5. The point is that the district court accepted petitioners' argument that it had so increased but held that fact to be irrelevant as to whether the consent decree should be dissolved. Petitioners repeatedly urged that any dispute over the workforce should be decided; the Times was content to have the district court hold that the issue was irrelevant, and it cannot now attempt to rely on other facts that it alleges prove otherwise.

3. The Times claims that "Petitioners fail to support their contention of pervasive continuing discrimination" (Times Brief in Opposition, p. 5), wholly ignoring the fact that the Times argued successfully to the district court that it was irrelevant whether or not there was discrimination or

whether or not the decree was being violated. Of course, it was the *Times'* burden, as the party seeking to vacate the decree, to make some showing that it was in compliance with the prohibitory provisions. It utterly failed to do so, and cannot now rely on purported facts not found by the district court to suggest that the industry was free of discrimination.

4. The description in footnote 3 of the Times' Brief (Times Brief in Opposition, p. 6) of Claim 186 is totally self-serving. The Times and the Union jointly promulgated a new list that was clearly in violation of the explicit terms of the consent decree and in defiance of an explicit order of the Administrator not to do so. After a proceeding that took many months and over 6,000 pages of testimony, the Administrator held that both the Times and the Union were guilty of intentional discrimination and had violated the consent decree when they issued the list and filled positions from it. The district affirmed the order of the Administrator, finding that the action of the Times and the Union was "In direct contravention of both the Settlement Agreement and the Administrator's Order." App. p. 77a. Interestingly, the Times and the Union both argued, as does the Times here, that this Court's decision in *Firefighters Local No. 1784 v. Stotts*, 476 U.S. 561 (1984) somehow justified their acting contrary to the consent decree. The district court's response is still apt:

> [T]he Times and the NMDU took matters into their own hands in open disregard of the plain language of the Settlement Agreement and the explicit order of the Administrator. This they cannot do. A court order must be obeyed.

(App. p. 84a.)

5. The Times misstates the basis for the petitioners' proof that there continued to be serious and pervasive violations of the consent decree. Times Brief in Opposition, pp. 6-7. The offer of proof and subsequent affidavits were not proffered to the district court in order to have that court

adjudicate individual claims of discrimination and violations of the decree. Indeed, a number of the claims set out in those affidavits had also been presented to the Administrator for just such adjudications. The purpose of the submission was to demonstrate that the respondents had failed in their obligation to comply in good faith with the consent decree over a reasonable period of time. Thus, they could not demonstrate the compliance that is an absolute prerequisite to obtaining a modification of, let alone a dissolution of, a consent decree. *Freeman v. Pitts*, 503 U.S. ___, 118 L. Ed. 2d. 108, 139 (1992).

6. Finally, the Times continues to make much of the introductory paragraphs of the consent decree, which contain boilerplate language, insisted on by all defendants as a condition for settlement, that they did not admit any violation of Title VII or 42 U.S.C. § 1981 by entering into the settlement. This argument ignores the fact that when the district court approved the decree, which was being challenged by non-minority workers, it made detailed findings concerning practices in the industry that perpetuated the effects of past discriminatory policies, and resulted in the nearly total exclusion of minorities from the industry. App. pp. 20a-22a. These findings were affirmed on appeal to the district court and are binding on the Times for the purpose of this proceeding. App. pp. 40a-41a.

II.

THIS CASE INVOLVES IMPORTANT ISSUES CONCERNING THE ADMINISTRATION OF CONSENT DECREES THAT ARE UNSETTLED

The Equal Employment Opportunity Commission agrees with petitioners that the case was wrongly decided below; the New York Times, of course, urges that the court below was correct. Both urge that this Court should not review the decision below whether it is right or wrong. Both are mistaken.

A. Does *Rufo* overrule *Swift*?

It is clear that there is great confusion in the lower courts as to whether the standard established by *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. ___, 116 L. Ed. 2d 867 (1992) does or does not govern all consent decrees entered by a federal court, or only those involving public defendants. We have set out the varying views of the Seventh, Sixth, Eighth, District of Columbia, and Federal Circuits in the petition for a writ of certiorari at page 19, and will not repeat that discussion here. More recently, the Third Circuit, in *Favia v. Indiana University of Pennsylvania*, 7 F.3d 332, 341 n. 15 (3rd Cir. 1993), noted the Seventh Circuit's view that *Rufo* overruled *United States v. Swift & Co.*, 286 U.S. 106 (1932). The Third Circuit stated that this was an open question that it would not resolve since the case before it involved a public institutional defendant. Clearly, the lower courts need guidance with regard to this important question.

B. The Conflict Over the Standard for Dissolving a Consent Decree Under *Rufo*.

As discussed at some length in the petition for certiorari, the district court here specifically held that it was irrelevant whether the defendants had violated the consent decree, and the court of appeals affirmed without even discussing the issue of compliance with all aspects of the decree. Thus, the Second Circuit applied a "flexible standard for modifying decrees" without any guidelines whatsoever as to what should govern a district court's discretion.

The decision below is in stark contrast to, and in conflict with, the approach of the Eleventh Circuit in the case of *United States v. City of Miami*, 2 F.3d 1497 (11th Cir. 1993). There, the court first held that the more flexible *Rufo* standard should apply to employment discrimination cases

where goals had been set.[1] However, the actual standards it held governed when a district court could vacate or dismiss a consent decree were much more stringent and explicit than the amorphous ones set out by the Second Circuit here. With regard to the requirement that good faith compliance must be shown, the Eleventh Circuit directed that "the district court should consider the City's record of compliance with the decree." 2 F.3d at 1508. Thus, "On remand, the district Court *must* reach the substantial compliance question to determine whether the City has acted in good faith." *Id.*, n. 38 (emphasis added). Further, the Eleventh Circuit held, contrary to the decision of the Second Circuit here, that the fact that the defendant had acted to remedy past discrimination was not enough. Rather,

> [T]ermination of the consent decree would be appropriate if the district court finds that the decree is clearly no longer necessary *either* to prevent discrimination in the future *or* to remedy the effects of past discrimination.

2 F.3d at 1508 (emphasis added).

Here, the district court, with the approval of the court of appeals held that it was irrelevant whether the prohibitory provisions of the decree were necessary to prevent future discrimination, because it was irrelevant that there was ongoing discrimination in the present. That conclusion was wrong, it was inconsistent with the decisions of this Court, and it is in conflict with the decision of the Eleventh Circuit.

And, contrary to the position of the Equal Employment Opportunity Commission, this issue is not merely "fact-specific." It goes to the heart of whether and to

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[1]Although the case before it involved a public institutional defendant, the City of Miami, the Eleventh Circuit stated broadly that employment discrimination cases generally that involved affirmative action goals should be governed by *Rufo*.

what extent consent decrees will bind the parties that freely enter into them, a question vital to the continued viability and effectiveness of the settlement of cases in the federal courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the court below reversed.

Respectfully submitted,

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